In The

Supreme Court of the United States

October Term, 1978

No. 78-1802

AMERICAN MOTORS SALES CORPORATION,
Petitioner,

v.

DIVISION OF MOTOR VEHICLES OF THE COMMONWEALTH OF VIRGINIA,

AND

VERN L. HILL, COMMISSIONER OF THE DIVISION OF MOTOR VEHICLES OF THE COMMONWEALTH OF VIRGINIA,

AND

VIRGINIA AUTOMOBILE DEALERS ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE VIRGINIA AUTOMOBILE DEALERS ASSOCIATION IN OPPOSITION

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OPINION BELOW

The unanimous opinon of the Court of Appeals for the Fourth Circuit is reported at 592 F.2d 219 (4th Cir. 1979),

and is reproduced in the Appendix to the petition beginning at App. 21. The opinion of the United States District Court for the Eastern District of Virginia, which the Court of Appeals reversed, is reported at 445 F. Supp. 902 (E.D. Va. 1978), and is reproduced in the Appendix to the petition beginning at App. 2.

JURISDICTION

The judgment of the Court of Appeals was entered on February 12, 1979. Following the denial by that court on March 7, 1979, of a petition for rehearing *en banc,* a petition to this Court for a writ of certiorari was filed on June 1, 1979. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether Virginia Code § 46.1-547(d), which prescribes an administrative procedure to avoid the establishment of more dealerships for a given line-make in a trade area than the particular market can support, violates the Commerce Clause of the United States.

STATUTE INVOLVED

Virginia Code § 46.1-547(d) provides in relevant part:

> It is unlawful for any manufacturer, factory branch, distributor or distributor branch, or any field representative, officer, agent or any representative whatsoever of any of them:
>
> * * *
>
> (d) To grant an additional franchise for a particu-

lar line-make of motor vehicle in a trade area already served by a dealer or dealers in that line-make unless the franchisor has first advised in writing such other dealers in the line-make in the trade area; provided that no such additional franchise may be established in the trade area if the Commissioner has determined, if requested by any party within thirty days after receipt of the franchisor's notice of intention to establish the additional franchise, and after a hearing on the matter, that there is reasonable evidence that after the grant of the new franchise, the market will not support all of the dealerships in that line-make in the trade area; provided, further, that a reopening of a franchise in a trade area that has not been in operation for more than one year shall be deemd the establishment of a new franchise subject to the terms of this subsection.

STATEMENT OF THE CASE

This case involves a constitutional challenge by American Motor Sales Corporation ("AMSC") to Virginia Code § 46.1-547(d). That statute addresses the placement by motor vehicle manufacturers or distributors of additional dealerships for a given line-make of a motor vehicle in a trade area already served by existing franchised dealers in the same line-make. When a manufacturer or distributor proposes to add additional dealers in a particular trade area, the statute requires the manufacturer or distributor to give notice of its plan to existing dealers in that line-make in the affected trade area. The statute provides an opportunity for a hearing on the matter before the Virginia Commissioner of Motor Vehicles prior to the grant of the additional franchise. The Commissioner is authorized to deny the grant of the additional franchise only if, on the basis of the hearing record, he determines that there is reasonable

evidence that with the addition of another franchise "the market will not support all of the dealerships in that line-make in the trade area."

Hearings conducted under the statute are subject to the procedural guarantees prescribed by Virginia Code § 46.1-550.1 and the Virginia Administrative Process Act, Va. Code Title 9, Ch. 1.1:1. The burden of persuasion is on the protesting party (*i.e.*, the existing franchised dealer) § 9-6.14:12.C.; all sides have the right to counsel and the right to cross-examination, § 9-6.14:12.C.; decisions are required to be made "with dispatch," § 9-6.14:12.C.; and decisions are subject to the right of judicial review, §§ 9-6.14:16 and 46.1-550.1.[1]

The challenge by AMSC to the constitutionality of § 46.1-547(d) was couched in the context of the only proceeding under that statute since its enactment in which the Commissioner had ruled against a manufacturer, determining that the market would not support all of the dealerships in the affected line-make. That proceeding, *P. D. Waugh & Co.* v. *American Motors Sales Corp. and Early AMC, Inc.*, involved a proposal announced by AMSC in October, 1975, to grant a new Jeep franchise in the rural community of Orange, Virginia to Early AMC, Inc. ("Early"), an existing dealer then franchised to sell AMC and Suburu vehicles in the Orange market. (Jt. App. 67).[2] That proposal

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[1] A Motor Vehicle Dealers' Advisory Board, created by Va. Code § 46.1-550.2, is directed to "consult with and advise" the Commissioner with respect to certain matters, including proceedings under § 46.1-547(d). The Board consists of six members, three of whom are franchised motor vehicle dealers and three of whom are "public" members. The Board is authorized to offer advice to the Commissioner in his deliberations, but it has no decision-making authority and the Commissioner is not bound to follow its advice.

[2] "Jt. App." refers to the Joint Appendix to the briefs filed in the Court of Appeals.

was objected to by P. D. Waugh & Co. ("Waugh") which held an existing franchise from AMSC to sell Jeep vehicles in Orange. The Early and Waugh businesses were located less than two miles from each other. (Jt. App. 102).

At an administrative hearing requested by Waugh on the matter under Virginia Code § 46.1-547(d), Waugh presented detailed evidence that Orange County had just experienced three major plant closings, that it had the highest unemployment rate in the State (14%), and that there were little prospects for economic or population growth in the area. (Jt. App. 96, 133-36, 226, 228). AMSC and Early offered no evidence to counter Waugh's arguments as to the particular economic conditions in the area. Although the hearing officer recommended that the additional franchise be approved, the Commissioner concluded that "there is reasonable evidence that after the grant of the additional franchise, the market will not support all of the dealerships in that line-make in the trade area." (Jt. App. 70). Neither AMSC nor Early sought judicial review of that decision as was their right under Virginia Code § 46.1-550.1.

Thereafter, AMSC and Early filed an action in the United States District Court for the Eastern District of Virginia against the Virginia Division of Motor Vehicles and its Commissioner seeking a declaratory judgment that § 46.1-547(d) is unconstitutional, broadly charging that the statute violates the Supremacy Clause, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the Commerce Clause of the United States Constitution. Waugh and the Virginia Automobile Dealers Association intervened in that action as defendants. The case was submitted to the District Court on cross-motions for summary judgment (Jt. App. 3-6), supported by a stipulation of facts (Jt. App. 67-71), affidavits (Jt. App. 7-5), memoranda of law and oral argument.

The District Court held that § 46.1-547(d) violates the Commerce Clause,[3] concluding (1) that under the authority of *Buck* v. *Kuykendall,* 267 U.S. 307 (1925), and *H. P. Hood & Sons, Inc.* v. *DuMond,* 336 U.S. 525 (1949), "the preservation of competition is not a legitimate local purpose under the Commerce Clause," and (2) that the protection of automobile dealers against unfair trade practices by manufacturers can be accomplished "with a much lesser burden on interstate commerce." *American Motors Sales Corp.* v. *Division of Motor Vehicles,* 445 F. Supp. 902, 911 (E.D. Va. 1978).

On appeal, the Court of Appeals for the Fourth Circuit reversed, holding on the basis of well established Supreme Court authority, and particularly this Court's recent decisions in *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117 (1978), and *New Motor Vehicle Board* v. *Orrin W. Fox Co.,* ...... U.S. ...... (1978), that (1) the Virginia statute serves a legitimate local purpose, (2) the statute regulates evenhandedly, and (3) the statute imposes no excessive burden on interstate commerce when balanced against the State's interest. *American Motors Sales Corp.* v. *Division of Motor Vehicles,* 592 F.2d 219 (4th Cir. 1979).[4]

AMSC has now petitioned this Court for a writ of certiorari to review the decision of the Court of Appeals.

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[3] The District Court addressed only the Commerce Clause issue and refrained from deciding the other constitutional arguments the plaintiffs had raised.

[4] In the meantime, while the case was on appeal in the Fourth Circuit, the stockholders of P. D. Waugh & Co. sold the business, AMSC terminated the Jeep franchise of the new owner, and Early was granted the franchise to sell Jeeps in the Orange trade area. As a result, neither Early nor Waugh remain as parties to this case.

REASONS FOR DENYING THE WRIT

I. This Court Has Already Resolved The Constitutional Issue Raised By This Case, And Since The Court Of Appeals Correctly Interpreted And Applied This Court's Precedents On The Matter, No Further Review Is Warranted

AMSC contends that the Supreme Court has never before addressed the issue whether a statute similar to Virginia Code § 46.1-547(d) violates the Commerce Clause. AMSC Pet. at 7-8. To the contrary, decisions of this Court have spoken squarely to the arguments AMSC has raised and without exception have upheld statutes similar to § 46.1-547(d) against constitutional attack.

To begin with, that statutes such as § 46.1-547(d) serve a legitimate public purpose sufficient under constitutional analysis is now beyond question. In *New Motor Vehicle Board* v. *Orrin W. Fox Co.,* ...... U.S. ......, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978), this Court considered a Due Process attack against a provision of the California Automobile Franchise Act that regulates the grant by manufacturers of additional dealer franchises in trade areas already served by dealers in that line-make. Specifically noting that at least 17 other states, including Virginia, have similar statutes, this Court commented that the purpose of such laws is "the promotion of fair dealing and the protection of small business." 58 L.Ed.2d at 371 n. 7. This Court further observed that:

> [T]he Act protects the equities of existing dealers by prohibiting automobile manufacturers from adding dealerships to the market areas of its existing franchisees where the effect of such intra-brand competition would be injurious to the existing franchisees and to the public interest.

58 L.Ed.2d at 371. Concluding that such a purpose is a valid state interest, this Court held that the state legislature "was empowered to subordinate the franchise rights of automobile manufacturers to the conflicting rights of their franchisees where necessary to prevent unfair or oppressive trade practices." 58 L.Ed.2d at 374. Drawing on those statements, the Fourth Circuit considering the parallel Virginia statute in the present case held that the Virginia law likewise serves a legitimate local purpose. 592 F.2d at 223.

Moreover, this Court has on several occasions upheld against Commerce Clause attack state statutes, such as § 46.1-547(d), that regulate who may act as retail sellers of products shipped in interstate commerce. Thus, in *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission,* 341 U.S. 329 (1951), this Court rejected a challenge to a Michigan statute that regulated the number of natural gas retailers permitted in a trade area. Noting that the interstate appellant in that case, just as AMSC in this case, was still free to supply its product to the Michigan markets through the existing and licensed retailer in that market, this Court held that the appellant had no constitutional right to increase the number of retailers in that market, saying:

> Although the end result might be prohibition of particular direct sales, to require appellant to secure a certificate of public convenience and necessity before it may enter a municipality already served by a public utility is regulation, not absolute prohibition. There is no intimation that appellant cannot deliver and sell available gas to Consolidated [the existing retailer] for resale to customers who have additional gas requirements. It is no discrimination against interstate commerce for Michigan to require appellant to route its sales of gas through the existing certificated utility

> where the public convenience and necessity would not be served by direct sales.

341 U.S. at 336.

More recently, this Court upheld a Maryland statute requiring petroleum producers to divest themselves of ownership and control of gasoline retail stations that compete in that state against independently owned and operated stations. *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117 (1978). Holding, first, that the state has a "legitimate purpose in controlling the gasoline retail market," 437 U.S. at 125, this Court rejected all Commerce Clause challenges, noting that the statute:

> [D]oes not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market.

437 U.S. at 126. Responding to the argument that by precluding from the Maryland market certain petroleum producers that do business exclusively through company-operated stations the statute impermissibly *burdens* interstate commerce, this Court said:

> Some refiners may choose to withdraw entirely from the Maryland market, but there is no reason to assume that their share of the entire supply will not be promptly replaced by other interstate refiners. The source of the consumers' supply may switch from company-operated stations to independent dealers, but interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another.

The crux of appellants' claim is that, regardless of whether the State has interfered with the movement of

goods in interstate commerce, it has interfered "with the natural functioning of the interstate market either through prohibition or through burdensome regulation." *Hughes* v. *Alexandria Scrap Corp.,* 426 U.S. 794, 806. Appellants then claim that the statute "will surely change the market structure by weakening the independent refiners. . . ." We cannot, however, accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market. See *Breard* v. *Alexandria,* 341 U.S. 622. As indicated by the Court in *Hughes,* the Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations. It may be true that the consuming public will be injured by the loss of the high-volume, low-priced stations operated by the independent refiners, but again that argument relates to the wisdom of the statute, not to its burden on commerce .

437 U.S. at 127-28 (footnote omitted).

In considering Virginia Code § 46.1-547(d), the Court of Appeals in this case properly recognized that the effects on commerce produced by that statute are no more burdensome than the effects of the Maryland statute upheld by this Court in *Exxon.* Thus, the Fourth Circuit concluded:

Tested by the principles explained in *Exxon,* we conclude that the Virginia statute imposes no unconstitutional burden on interstate commerce. The public in the Orange market area may buy as many Jeeps as Waugh can sell. If Waugh does not persuade potential purchasers to buy Jeeps, they can buy competitive vehicles. Conversely, American and its competitors can supply the market with all the four-wheel drive vehicles that it will absorb. The statute may affect the structure of the retail market by shifting business from one out-of-state manufacturer to another. But, when a

> statute is otherwise valid, the commerce clause does not insulate this aspect of trade from state regulation. *Exxon,* 98 S.Ct. at 2215.
>
> The Virginia statute restricts intrabrand competition between Jeep dealers by excluding Early from the Orange market. But that effect alone does not establish a violation of the commerce clause.

592 F.2d at 223.

AMSC contends that the Court of Appeals misapplied *Exxon* by failing to recognize that "the effect of the Virginia statute on interstate commerce is far greater than the effect of the Maryland statute." AMSC Pet. at 13. According to AMSC this "greater effect" results from the fact that the Virginia statute does not simply regulate the structure of local retail markets, as in *Exxon,* but rather prohibits a purely interstate transaction—the grant of a franchise by an out-of-state manufacturer to an in-state dealer. AMSC Pet. at 13.

To suggest that a statute is constitutionally deficient because it addresses the grant of a franchise for the retail sale of motor vehicles rather than the retail sales themselves is but to raise form over substance. Under such a theory, a statute that denied not the grant of the franchise but rather the right of a dealer holding a franchise to resell his vehicles to the public would pass constitutional muster, whereas a statute that denied the grant of the franchise in the first place would not. The end result under both statutes would be the same, sales of the product could not be made through the proposed new dealer, but one statute would be constitutional and the other would not. Nothing in any of this Court's prior decisions, including *Exxon,* suggests such a distinction and the Court of Appeals was right in rejecting the notion.

AMSC also insists that rather than following *Exxon,* the Court of Appeals should have been guided by the language of early decisions of this Court in *Buck* v. *Kuykendall,* 267 U.S. 307 (1925), and *H. P. Hood & Sons, Inc.* v. *DuMond,* 336 U.S. 525 (1949). AMSC Pet. at 9-12. As the Court of Appeals recognized, however, the language of those cases is more appropriately applied in contexts of *discrimination* against interstate commerce, 592 F.2d at 223 and n. 5, as has been made clear by numerous decisions of the Supreme Court. *See, e.g., Breard* v. *Alexandria,* 341 U.S. 622, 637 (1951) ("in *Hood,* it was the discrimination against out-of-state dealers that invalidated the order"); *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.,* 340 U.S. 179, 188 (1950) ("The vice in the regulation invalidated in *Hood* was solely that . . . the regulation discriminated against interstate commerce"); *Stephenson* v. *Binford,* 287 U.S. 251, 266-67 (1932) (distinguishing *Buck* as dealing with a statute "affecting interstate commerce and with discriminations relating thereto"); *Morris* v. *Duby,* 274 U.S. 135, 143 (1927) (citing *Buck* for the rule that "the State may not discriminate against interstate commerce").[5] Not even AMSC has suggested that Virginia Code § 46.1-547(d) discriminates against interstate commerce.

After *Exxon,* there is little this Court could add to a further understanding of the Commerce Clause by undertaking a review of the Court of Appeals decision in the present case. Under *Exxon,* AMSC can have no Commerce

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[5] See also *Tober Foreign Motors, Inc.* v. *Reiter Oldsmobile, Inc.,* 381 N.E. 2d 908 (Mass. 1978), upholding the Massachusetts counterpart to Va. Code § 46.1-547(d), and distinguishing *Buck* on the ground that the statute involved there constricted physical channels of commerce itself—the interstate passage of common carriers—obstructing " 'facilties for conducting interstate commerce,' " 381 N.E. 2d at 915.

Clause complaint against the Virginia statute as that law does nothing to prohibit the flow of AMSC products, or any other manufacturer's product, into the Virginia markets. The fact that AMSC is not free to jam the Virginia markets with more dealerships for its products than the markets can support has no constitutional significance under *Exxon*. The Court of Appeals decision was fully consistent with *Exxon* and the other relevant decisions of this Court, and there is nothing in the AMSC petition or the record of this case to suggest that a rethinking of constitutional principles established by those decisions is now in order.

II. There Has Been No Conflict In Decisions Involving Statutes Similar To Virginia Code § 46.1-547(d) Since The Supreme Court's Decisions In EXXON And ORRIN FOX

AMSC suggests that Supreme Court review of this case is necessary to resolve a conflict in decisions by state courts as to the constitutionality of statutes similar to Virginia Code § 46.1-547(d). AMSC Pet. at 8. The only case cited by AMSC as holding against the constitutionality of such statutes is a decision by the Georgia Supreme Court in *General GMC Truck, Inc.* v. *General Motors Corp.*, 237 S.E.2d 194 (Ga. 1977), *cert. denied*, 434 U.S. 996 (1977).[6]

The Georgia case was decided in 1977, *before* this Court's decisions in *Exxon Corp.* v. *Governor of Maryland, supra,*

[6] The Georgia statute was significantly different from the Virginia statute. By its terms, the Georgia statute addressed not the public interest question of what the market can support (as the Virginia statute does), but rather whether the addition of another dealership would cause "a reduction in the business of the existing dealer." Ga. Code Ann. § 84-6610(f) (10) (Supp. 1976). The Virginia statute does not protect an existing dealer's sales percentage in the market. The Georgia statute also placed the burden of proof on the manufacturer, whereas the burden under the Virginia statute is on the protesting dealer. See discussion *supra* p. 4.

and *New Motor Vehicle Board* v. *Orrin W. Fox Co., supra.* Significantly, in every reported case since those decisions by the Supreme Court, the courts have upheld the constitutionality of statutes similar to the Virginia law. Thus, in addition to the decision by the Court of Appeals below in the present case,[7] the Massachusetts Supreme Judicial Court has rejected all constitutional challenges (including a Commerce Clause attack) against a similar statute of that state, citing this Court's decision in *Exxon. Tober Foreign Motors, Inc.* v. *Reiter Oldsmobile, Inc.,* 381 N.E.2d 908, 915 (Mass. 1978). Similarly in *Chrysler Corp.* v. *New Motor Vehicle Board,* 153 Cal. Rptr. 135 (Cal. Ct. App. 1979), a California Court of Appeals upheld the counterpart California statute, specifically rejecting the analysis of the District Court in the present case as being in error under the principles of *Orrin Fox* and *Exxon.*

The point is that with *Orrin Fox* and *Exxon,* the courts of the land now have clear and ample guidance for the determination of the constitutionality of statutes such as Virginia Code § 46.1-547(d). There has been no conflict in the cases since those decisions and there is not likely to be.

[7] Neither *Exxon* nor *Orrin Fox* had been decided at the time of the District Court's decision.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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